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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1877

UNION OIL COMPANY OF CALIFORNIA,

Petitioner,

v.

HAROLD N. EVANSON, UNITED STATES OF AMERICA, THE HONORABLE EARL R. LARSON, UNITED STATES DISTRICT JUDGE, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES.

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Page

INDEX

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT 4

REASONS FOR GRANTING THE WRIT 8

CONCLUSION 19

APPENDIX

A. Caption of *Harold N. Evanson et al.* and *United States of America*, et al., v. *Union Oil Company of California*, Civil Action No. 4-75-671 (D. Minn.) A-1

B. Opinion of the Temporary Emergency Court of Appeals of the United States, dated April 7, 1980 ..... A-2

C. Order of the United States District Court for the District of Minnesota, dated August 14, 1979 ..... A-8

D. Order of the United States District Court for the District of Minnesota, dated December 14, 1979 ..... A-12

E. Statutory Provisions Involved A-22

AUTHORITIES CITED

Allied Paper, Inc. v. *United Gas Pipeline Company*, 561 F.2d 821, (TECA 1977) 17

Champlin v. Marine Petroleum Co., _____ F.2d ____ (TECA No. 8-4, February 25, 1980) 17

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 15-17

Dellums v. Powell, 566 F.2d 231 (D.C. Cir. 1977) 10, 14

Diaz v. Southern Drilling Corp., 427 F. 2d 1118, (5th Cir. 1970), *cert. denied sub nom. Trefina* v. *United States*, 400 U.S. 878 (1979) 11, 15-16, 18

Dorsey v. Academy Moving and Storage, Inc., 423 F. 2d 858, (5th Cir. 1970) 11

Dow Chemical Co. v. *Taylor*, 519 F.2d 351 (6th Cir. 1975), *cert. denied*, 423 U.S. 1033 (1976) 17

Edgar v. *Slaughter*, 548 F.2d 770 (8th Cir. 1977) ... 11

Familias Unidas v. Briscoe, 544 F.2d 182 (5th Cir. 1976) 12

Flaks v. Koegel, 504 F.2d 702 (2nd Cir. 1974) 11

Gillespie v. *United States Steel Corp.*, 379 U.S. 148 (1964) 18

Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909) 14

Longview Refining Company v. *Shore*, 554 F.2d 1006 (TECA 1977), *cert denied*, 434 U.S. 836 (1977) 4, 7, 18

National Hockey League v. *Metropolitan Hockey Club*, 427 U.S. 639 (1976) 8-10, 12, 14

O'Toole v. *William J. Meyer Co.*, 243 F.2d 765 (5th Cir. 1957) 13

Professional Hockey Antitrust Litigation, 63 F.R.D. 641 (E.D. Pa. 1974), *rev'd.*, 531 F.2d 1188 (3rd Cir. 1975), *rev'd.*, 427 U.S. 639 (1976) 11

Societe Internationale v. *Rogers*, 357 U.S. 197, (1958) 12, 14

State of Ohio v. *Arthur Anderson & Co.*, 570 F.2d 1370 (10th Cir. 1978), *cert. denied*, 439 U.S. 833 (1978) 16

Sun Oil Company of Pennsylvania v. *FEA*, 572 F.2d 867, (TECA 1978) 17

United States v. *Ryan*, 402 U.S. 530 (1971) 17

United States v. *Meyer*, 398 F.2d 66 (9th Cir. 1968) 13

Wilson v. *Volkswagen of America, Inc.*, 561 F.2d 494 (4th Cir. 1977), *cert. denied*, 43 U.S. 1020 (1978) 10-11, 14

Other Authorities:

United States Constitution
Fifth Amendment, Due Process Clause 2

Federal Rules of Civil Procedure, Rule 37 ..... *passim*

Notes of Advisory Committee on Federal Rules of Civil Procedure, 28 U.S.C.A., Rule 37 14

Note, "Standards for Imposition of Discovery Sanctions," 27 Maine L. Rev. 27 (1975) 12-13

United States Code
15 U.S.C. §§751 et seq 4
12 U.S.C. §1904, note 2
28 U.S.C. §1254 2
28 U.S.C. §1291 3

Code of Federal Regulations
10 C.F.R. §212.82(f)(1)(i) 13

Supreme Court Rules, Rule 19(1)(b) 19

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UNION OIL COMPANY OF CALIFORNIA,

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HAROLD N. EVANSON, UNITED STATES OF AMERICA, THE HONORABLE EARL R. LARSON, UNITED STATES DISTRICT JUDGE, ET AL.,

Respondents.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES.

Union Oil Company of California ("Union") petitions for a writ of certiorari to the Temporary Emergency Court of Appeals of the United States to review a judgment of that court entered April 7, 1980 in two consolidated appellate proceedings (an appeal and a petition for writ of mandamus and prohibition pursuant to 28 U.S.C. § 1651).

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[1]Respondents include all plaintiffs in the underlying civil action, *Harold N. Evanson, et al. and United States of America, et al.* v. *Union Oil Company of California*, Civil Action No. 4-75-671 (D. Minn.), the caption of which is Appendix A, p. A-1.

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals dismissing the appeal and declining to issue the requested writ of mandamus and prohibition (Appendix B, pp. A-2—A-7) is not yet officially reported. The orders of the district court entered on August 14, 1979 (Appendix C, pp. A-8—A-11) and on December 14, 1979 (Appendix D, pp. A-12—A-21) are not officially reported.

JURISDICTION

The judgment and opinion of the Temporary Emergency Court of Appeals sought to be reviewed were entered on April 7, 1980. On May 12, 1980, Chief Justice Burger extended the time for filing a petition for writ of certiorari to and including May 27, 1980. The jurisdiction of this Court to review the instant case is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904, note, and 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether it is consistent with the Due Process Clause of the Fifth Amendment and Rule 37, F.R.Civ.P., and a proper exercise of judicial power, for a federal district court to impose sanctions under Rule 37, restricting a defendant from fully defending plaintiffs' claims at trial when (a) the defendant was effectively denied a hearing on the question of what sanctions, if any, would be appropriate and lawful under the circumstances, and (b) the particular sanctions imposed are unrelated to the discovery information sought, and go beyond the discovering parties' adversarial interest in the litigation.

2. Whether it is proper and consistent with the provisions of 28 U.S.C. §1291 for an appellate court, in the circumstances of this case, to dismiss an appeal of a decision which finally and conclusively resolves an important issue completely separate from the merits of the main action and which is effectively unreviewable on appeal from a final judgment.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved, which are set forth in Appendix E, pp. A-22 — A-31, are:

Statutes:

Sections 208 and 210, Economic Stabilization Act of 1970, Pub. L. No. 91-379, 12 U.S.C. § 1904, note,

Section 5(a)(1), Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, as amended, 15 U.S.C. §754(a)(1).

Regulations:

10 C.F.R. § 212.31; 39 F.R. 1950 (January 15, 1974).

10 C.F.R. § 212.82(a); 39 F.R. 1952 (January 15, 1974).

10 C.F.R. § 212.82 (f)(1)(i); 39 F.R. 1953 (January 15, 1974).

10 C.F.R. § 212.82 (f)(3); 39 F.R. 1954 (January 15, 1974).

10 C.F.R. § 212.83(d); 39 F.R. 1956 (January 15, 1974).

Rules:

Rule 37, Federal Rules of Civil Procedure.
Supreme Court Rules, Rule 19(1)(b).

STATEMENT

Union is an integrated energy company publicly traded on the New York Stock Exchange engaged in the production of crude oil and natural gas, the refining of crude oil and the marketing of refined petroleum products. Sales of gasoline, distillates and other covered petroleum products by Union are subject to the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, as amended, 15 U.S.C. §§ 751 *et seq.*, and the Mandatory Petroleum Price Regulations promulgated pursuant thereto, specifically 10 C.F.R. §§ 212.81 through 212.88, relating to sales by refiners.[2]

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[2]The Cost of Living Council promulgated the first price regulations dealing specifically with petroleum products under Phase IV of the Economic Stabilization Program. See 38 F.R. 22536 (August 22, 1973). Since initial promulgation, numerous amendments to the price regulations have been made by the various agencies charged with their administration. See *Longview Refining Company* v. *Shore*, 554 F.2d 1006 (TECA 1977), *cert. denied*, 434 U.S. 836 (1977), for a review of the early changes and amendments to these regulations. The regulations, as they existed on January 15, 1974, are used as a point of reference herein.

Since shortly after the August 1973 initial promulgation of the Phase IV petroleum pricing regulations, the compliance activities of Union, as with other major refineries, have been the subject of audit and supervision by the United States Department of Energy and its predecessor agencies. In the early months of Phase IV of petroleum price regulation, representatives of such agencies expressed disagreement with numerous aspects of the compliance program initially established by Union, including Union's class of purchaser structure and Union's treatment of discounts and allowances. In response, Union implemented an extensively revised pricing structure, effective January 1, 1975, which treated each customer as a separate class of purchaser and established for each customer a base price equal to Union's posted price on May 15, 1973 increased by cost pass throughs and reduced by the discount in effect for any customer on May 15, 1973.

On December 13, 1975, private plaintiffs, Harold E. Evanson, *et al.*, commenced a class action on behalf of certain retail customers of Union alleging willful pricing violations by Union for the period prior to January 1, 1975. Specifically, private plaintiffs alleged that Union had withdrawn certain discounts in effect on May 15, 1973 and that the prices Union charged plaintiffs after the discount withdrawal were in excess of lawful selling prices under the regulations. On February 2, 1978, the United States on behalf of the Department of Energy moved to intervene as a party plaintiff to the action purportedly to represent the interests of customers of Union not included in private plaintiffs' class. Since original commencement of the action, private plaintiffs have been allowed, over objection, to expand their certified class and to add allegations of pricing violations with respect to discount removal or modification after January 1, 1975.

Prior to the discovery dispute which is the subject of this petition, Union had produced over 12,000 pages of documents for plaintiffs and had responded to over 1,600 interrogatories and interrogatory subparts. This is in addition to the nearly 1,500 documents totaling over 4,000 pages developed in the Union audit file of federal plaintiffs most of which documents had been originally produced for the audit authorities by Union.

The particular discovery dispute which gives rise to this petition centers on an interrogatory of private plaintiffs which requested that defendant "[s]tate in detail the manner in which Union determined its May 15, 1973 Weighted Average Price by terminal for each class of purchaser." While private plaintiffs' class consists of only certain retail customers of Union, this interrogatory sought information relative to all customers of Union, including those in the wholesale, jobber and commercial classes. Thus, it was answered by Union only after objections as to overbreadth and relevance had been overruled. In answering the interrogatory, Union described certain computer runs which it had made to calculate weighted average prices.

On August 1, 1979, private plaintiffs brought a motion requesting an evidentiary hearing to determine whether Union had given false answers to certain of private plaintiffs' interrogatories and, if so, for an order of the court providing for appropriate sanctions under Rule 37(b)(2). By memorandum order, dated August 14, 1979, the district court granted private plaintiffs' motion for an evidentiary hearing and ordered that at that hearing, Union produce certain documents described in the disputed interrogatory answers. (Appendix C, pp. A-8—A-11).

Subsequent to the evidentiary hearing held on October 3 through October 5, 1979, the district court issued its order. The December 14, 1979 order, now the subject of this petition, found that Union had falsified interrogatory answers and imposed severe sanctions against Union. The sanctions imposed were that certain facts necessary to private plaintiffs' claims for treble damages and federal plaintiffs' claims for penalties would be "deemed to be established for all purposes" and that Union was to pay non-government plaintiffs' attorneys' fees and expenses, in the amount of *$60,961.09, (Appendix D, pp. A-12—A-21). Specifically,* the following facts were deemed to be established for all purposes:

1. That defendant Union Oil Company of California knew how it was required to calculate selling prices on its gasoline products under the applicable pricing regulations.

2. That for all classes of customers defendant Union Oil Company of California did not use as the actual selling prices of its gasoline products the prices required under the applicable regulations.

3. That the responsible executives of Union Oil Company of California and therefore Union Oil Company of California, itself, knew that the actual selling prices of its gasoline products were not the prices required under the applicable regulations.[3]

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[3]At least under the standards articulated in *Longview Refining Company* v. *Shore, supra,* such findings establish a factual foundation for the conclusion that Union had willfully and intentionally violated the federal statute.

On January 11, 1980, Union filed a notice of appeal from the district court's order and alternatively petitioned for a writ of mandamus and prohibition directing that the district court vacate its order and enjoining its enforcement. Plaintiffs subsequently filed motions to dismiss Union's appeal for lack of jurisdiction. On April 7, 1980, the Temporary Emergency Court of Appeals granted plaintiffs' motions to dismiss the appeal and denied Union's petition for writs of mandamus and prohibition. (Appendix B, pp. A-2—A-7).

REASONS FOR GRANTING THE WRIT

I.

This petition presents for review the question of whether it was denial of due process and a violation of federal law for the district court to impose severe sanctions against a defendant when such sanctions bear no reasonable relationship to the discovery information sought and go beyond the discovering parties' adversarial interest in the litigation and were imposed without defendant having an opportunity to present evidence as to which sanctions would be appropriate. This petition thus presents squarely for review the question of what constitutional constraints must limit a court's exercise of power under Rule 37 in light of this Court's decision in *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976).

A fundamental error underlying the entire district court's sanction order is the court's finding that a false interrogatory answer was given by Union. Contrary to this essential fact found by the district court, and not

corrected by the Court of Appeals, the record establishes unequivocally that each of the weighted average price calculations identified in Union's answer to the interrogatories in question had been made and had been used in the Union price monitoring system. Unrefuted evidence of those facts was introduced at the October 3, 1979 evidentiary hearing.

Notwithstanding that record evidence, Union's petition does not rest upon the errors of fact made by the district court. Rather, Union's position is that review of the denial of due process to Union and the other serious errors of law by the district court and the Temporary Emergency Court of Appeals should not be precluded because of basic erroneous factual findings made without support in the record and contrary to unequivocal facts of record. To deny review because of erroneous findings would emasculate the constitutional restrictions placed upon the imposition of discovery sanctions and would allow lower courts to evade review by reaching unsupported conclusions.[4]

The significant legal question presented by this petition revolves around the meaning and import of this Court's statement in *National Hockey League* that "the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but

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[4]See *National Hockey League* v. *Metropolitan Hockey Club*, *supra* at 641, 643, where this Court granted certiorari and reversed the Third Circuit, which the Supreme Court found had arrived at erroneous factual conclusions.

to deter those who might be tempted to such conduct in the absence of such a deterrent". 427 U.S. at 643. At least one lower court appears to conclude that the deterrent effect of a discovery sanction is all that need be considered before the selection and imposition of such sanction. *Dellums v. Powell,* 566 F.2d 231 (D.C. Cir. 1977). By far, the better analysis and interpretation of the statements in *National Hockey League* is found in the comprehensive and well reasoned opinion of the Fourth Circuit in *Wilson v. Volkswagen of America, Inc.,* 561 F.2d 494 (4th Cir. 1977), *cert denied,* 434 U.S. 1020 (1978).

In *Wilson,* the Fourth Circuit properly placed the deterrent element of *National Hockey League* into perspective with the procedural history and unique facts of that case and with the constitutional framework that has grown up around discovery sanctions of federal courts. The decision in *Wilson* gave recognition to the importance of deterrence; yet this was accomplished in a manner consistent with the full body of federal law that preceded *National Hockey League.*

Union respectfully submits that only if this Court is willing to accept a pure deterrence theory of discovery sanctions and confirm that its isolated statement in *National Hockey League* stands for a radical departure from prior law, may the district court's sanction order against Union be allowed to stand. The departure of the district court from traditional and well-accepted constitutional constraints in this matter starkly presents the issue facing this Court.

Decisions of the circuit courts, both before and after *National Hockey League,* have consistently required that before discovery sanctions are imposed, the discovered party must be afforded a hearing on the

question of what sanctions, if any, would be appropriate under the circumstances.[5] This is a corollary of the normal rule that a discovery sanction must be no more severe than that which is necessary to prevent prejudice to the movant.[6] *In Re Professional Hockey Antitrust Litigation,* (E.D.Pa. 1974)[7] illustrates the procedure to be followed before a district court imposes sanctions of the severity imposed in this matter. There the trial court, after full argument, entered detailed findings which supported its conclusion that no remedy other than default judgment would "prevent prejudice to the movant."

In this matter, the district court's order of August 14, 1979 setting the evidentiary hearing recognized the right of Union to be heard on the issue of which sanctions would be appropriate, but effectively denied that right, since it required that Union admit fifteen days prior to the hearing that it had falsified answers to interrogatories if it wished to be heard on the issue of appropriate sanctions (Appendix C, pp. A-8—A-11). Union does not admit that interrogatory answers were falsified and thus, the issue of appropriate sanctions was never heard before the district court.

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[5]*Edgar* v. *Slaughter,* 548 F.2d 270 (8th Cir. 1977); *Flaks* v. *Koegel,* 504 F.2d 702, 712-713 (2nd Cir. 1974); *Wilson* v. *Volkswagen of America, Inc., supra.*

[6]*Dorsey* v. *Academy Moving and Storage, Inc.,* 423 F.2d 858, 860 (5th Cir. 1970); *Diaz* v. *Southern Driling Corp.,* 427 F.2d 118, 1127 (5th Cir. 1970), *cert denied sub nom. Trefina* v. *United States,* 400 U.S. 878 (1970).

[7]63 F.R.D. 641, *rev'd.,* 531 F.2d 1188 (3rd Cir. 1975), *rev'd.* 427 U.S. 639 (1976).

Not surprisingly the failure of the district court to afford Union this minimal element of procedural due process resulted in omissions and excesses in the December 14, 1979 sanction order which that court issued. (Appendix D, pp. A-12—A-21). The face of the sanction order indicates that the district court completely omitted consideration of important factors uniformly held to be a constitutional prerequisite to the issuance of this type of discovery sanction order. These constitutional prerequisites include the consideration of the materiality of the disputed interrogatories,[8] the degree of prejudice, if any, to the discovering party in the presentation of its case, the willfulness or bad faith on the part of the discovered party,[9] and the propriety of less severe sanctions.[10].

The defects in the December 14, 1979 sanction order result in excessive restrictions on Union's right to defend the claims of both private and federal plaintiffs at trial. First, the sanctioned findings "deemed to be established for all purposes" conclude that Union did not use as actual selling prices "the prices required

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[8]See *Familias Unidas* v. *Briscoe*, 544 F.2d 182, 191 (5th Cir. 1976) ("[T]he answers to the disputed interrogatories were neither crucial nor in fact necessary.") *Cf., National Hockey League v. Metropolitan Hockey Club., Inc., supra,* where the district court's sanction order was upheld because "crucial interrogatories" had gone unanswered.

[9]*Societe Internationale* v. *Rogers,* 357 U.S. 197, 212 (1958).

[10]As one commentator has aid, "where any of the more severe sanctions is imposed. . . it is reversible error to neglect to consider the milder sanctions." "Standards for Imposition of Discovery Sanctions", 27 Maine L. Rev. 247, 266. (1975).

under the applicable regulations" which encompasses noncompliance with regulations on discounts, class of purchaser and cost pass through, even though the disputed interrogatories related only to the calculation of weighted average price, one discrete component of the pricing regulations, See 10 C.F.R. §212.82(f)(1)(i). (Appendix E, pp. A-23—A-32).

Second, each of the sanctioned findings has been imposed without regard to the time period relevant to the disputed interrogatories. Thus, while the interrogatories only relate to the period prior to January 1, 1975, when Union completely revised its pricing structure, the sanctioned findings are applicable to the full period of time relevant to the lawsuit, i.e., 1973 to date.

Finally, the court's sanctioned finding that "for all classes of customers" Union "did not use as the actual selling prices of its gasoline products the prices required under the applicable regulations", means that a continuing pricing violation has been established for commercial, jobber and wholesale classes of Union, based upon an answer to an interrogatory of private plaintiffs whose action is limited to Union's retail class. The result, which accrues directly to the benefit of federal plaintiffs, is sanctioned findings which go far beyond private plaintiffs' adversarial interest in the lawsuit in violation of settled constitutional standards for the imposition of discovery sanctions.[11]

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[11]As stated in "Standards for Imposition of Discovery Sanctions", supra at 266-267, "[w]here a lawsuit lends itself to division into discrete areas for trial, a noncompliance regarding one area does not merit a sanction affecting the other issues of the case," citing *United States* v. *Meyer*, 398 F.2d 66 (9th Cir. 1968) and *O'Toole* v. *William J. Meyer Co.*, 243 F.2d 765 (5th Cir. 1957).

In these circumstances the district court's imposition of discovery sanctions - which bear no relationship to the discovery information sought and which are not limited to the scope of private plaintiffs' lawsuit - can only serve a punitive function. Before *National Hockey League* it was uniformly accepted that this was improper. It has been long held by this Court that for the imposition of discovery sanctions to be valid and proper, they must be for the purposes of fulfilling and furthering the discovery process and not for purposes of imposing punishment. *Hammond Packing Co. v. Arkansas,* 212 U.S. 322 (1909). This principle was later explicitly recognized in *Societe, supra,* 357 U.S. at 209, 210 and was expressly cited, as well, by the drafters of Rule 37. See Notes of Advisory Committee on Rules, 28 U.S.C.A., Rule 37, p. 225.

In Union's view this Court's decision in *National Hockey League* did not signal a departure from this earlier constitutional principle. However, it is clear that uncertainity as to the proper role of Rule 37 has followed in the wake of *National Hockey League.* A comparison of *Wilson* v. *Volkswagen of America, Inc., supra,* with *Dellums* v. *Powell, supra,* provides one example of this uncertainty and the conflict in the circuits below.

The instant matter - presenting a clear cut case of imposition of discovery sanctions unrelated to the alleged discovery violation and indeed to the discovering parties' lawsuit - presents an opportunity for this Court to further address the important federal procedural questions referred to in *National Hockey League* and to establish firm principles which will avoid conflicting decisions as to the application of Rule 37 in the future.

II.

This case presents for review a second important federal law question: whether it was proper for the appellate court to dismiss an appeal of a decision which conclusively resolved a critical issue completely separate from the merits of the main action and which is effectively unreviewable on appeal from a final judgment. Union respectfully submits that the decision of the Temporary Emergency Court of Appeals that the district court sanction order was not a "final" decision of a nature which would give that court appellate jurisdiction is clear legal error in conflict with decisions in other circuits and previous decisions of the Temporary Emergency Court of Appeals.

While the number of reported decisions on this issue is small, there is consistent support for the view that discovery sanction orders, in contrast to other interlocutory discovery orders, are considered of a collateral and independent nature appealable under the "collateral order" doctrine first enunciated by this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). For example, in *Diaz v. Southern Drilling Corporation, supra,* the Fifth Circuit held appealable a trial court decision which awarded the government-intervenor judgment by default for repeated failure of a corporate officer to make himself available for deposition. The order was held appealable in spite of the fact that since it was issued in the context of a multiple-claim and multiple-party lawsuit, Rule 54(b), F. R. Civ. P. would ordinarily make it non-final. 427 F.2d at 1122. The court in *Diaz* found the sanction order to fall within the *Cohen* collateral order exception, stating:

> The default judgement here was issued as a sanction for appellant's failure to produce its officer for deposition, an issue that depends entirely on the circumstances surrounding that failure as considered in light of a procedural rule, Fed.R.Civ.P. Rule 37(d). The record discloses little about the underlying claims for commissions, and we do not need to know about the merits of those claims . . . [T]he order appealed from is collateral in the sense that it is completely separable and independent from all other claims of all other parties.

427 F.2d at 1123.

Also, in *State of Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370 (10th Cir. 1978), *cert. denied,* 439 U.S. 833 (1978), the court was called upon to determine whether an order imposing preclusionary and monetary sanctions for noncompliance with discovery orders was appealable under *Cohen.* In addressing circumstances very similar to the ones presented in the instant matter, the court stated:

> The district court has now imposed sanctions. It makes no practical difference whether its order be reviewed on direct appeal or by mandamus. Andersen is entitled to a review. We have here "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." *Cohen v. Beneficial Loan Corp.,* 337 U.S. 541, 546-547, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528. Although the order may be collateral, we are convinced that under *Cohen v. Beneficial Loan Corp.,* it is appealable.

570 F.2d at 1372.

In further support of the appealability of discovery sanction orders under the *Cohen* rule are decisions such as *United States* v. *Ryan,* 402 U.S. 530 (1971), which state in the context of appeals from orders compelling discovery, that appeal is not available at that stage because appeal will be available when and if a discovery sanction order is issued. 402 U.S. at 532. *See also Dow Chemical Company v. Taylor,* 519 F.2d 352, 355 (6th Cir. 1975), *cert. denied,* 423 U.S. 1033 (1976).

Even within the decisions solely of the Temporary Emergency Court of Appeals there is an evident conflict in the application of the *Cohen* collateral order doctrine. In a number of cases, which present less compelling circumstances for immediate appellate consideration than presented in the instant matter, the Temporary Emergency Court of Appeals has accepted jurisdiction. *See Allied Paper, Inc.* v. *United Gas Pipe Line Company,* 561 F.2d 821, 825 (TECA 1977) (stay of federal proceeding pending resolution of state action between same parties held appealable); *Sun Oil Company of Pennsylvania v. FEA,* 572 F.2d 867, 871 (TECA 1978) (stay of proceedings pending resolution of action in District of Kansas appealable); *Champlin v. Marine Petroleum Co.,* _____ F.2d _____ (TECA No. 8-4, February 25, 1980) (denial of DOE motion for dismissal as a party to a private action held an appealable final decision on a claim of right of DOE).

In the instant matter, the district court has reached a final decision on plaintiffs' claim of right that they are entitled to discovery sanctions. While the appellate court characterized the order as "not dispositive of all of Union's defenses that can be made in the district court" (Appendix B., pp. A-2—A-7), there can be no question that the sanctioned findings conclusively determine issues that would otherwise be sharply disputed at trial.

Moreover, given the sweeping nature of the sanctioned findings and their correlation with the standards for willfulness, as found in *Longview Refining Company, supra,* it is difficult to envision how Union will be able to effectively present a defense at trial on this crucial issue.

As in *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), the sanction order here has resolved questions which are "fundamental to the further conduct of the case." Suffice to say that if Union is forced to proceed through trial in this matter[12] under the burden of the district court's unwarranted sanctioned findings, the result will be an undue infringement upon its right to trial by jury under the seventh amendment. That infringement cannot be effectively repaired upon review of the ultimate disposition of the case. This Court must conclude that "delay of perhaps a number of years in having [its] rights determined might work a great injustice" to defendant herein. *Gillespie v. United States Steel Corp., supra* at 153. Union "cannot make important decisions about its further participation in this suit without having its rights determined now." *Diaz* v. *Southern Drilling Corp., supra at 1123.* The possibility that later appellate review would be effective is simply too slight.

Given the extremely narrow base from which the district court's sanction order issues, the magnitude of the treble damages and civil penalties sought by plaintiffs in this proceeding and the extensive and telling impact of the sanctioned findings on such potential penalties, there is no queston that this matter

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[12]Trial in this matter is presently scheduled for September of 1980.

presents an order which is too important to be denied review. Because the Temporary Emergency Court of Appeals has effectively sanctioned the district court's extreme departure from the accepted and usual course of judicial proceedings, this Court should exercise its power of supervision and should vacate and rescind the order of the district court. Rule 19(1)(b) of the Supreme Court Rules.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated this 27th day of May, 1980.

Respectfully submitted,

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Appendices

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Harold N. Evanson and Gayland B. Miller d/b/a/ Heights Auto Wash; Stephen T. Graham; Brookdale Car Wash, Inc., a Minnesota Corporation; John Vitale; Keystone, Inc., a Minnesota Corporation; Jerome F. Hanover; Central Car Wash, Inc., a Minnesota Corporation; Alex M. Berco d/b/a/ Loring Auto Wash Company; Donald L. Elsen; Richard P. Elsen; James V. Casey; Glo-Auto Wash, Inc., of Lincoln Park; Glo-Auto Wash, Inc., of Dearborn; and all other persons similarly situated;

and

UNITED STATES OF AMERICA on behalf of the Department of Energy;

Plaintiffs,

v.

UNION OIL COMPANY OF CALIFORNIA,

Defendant.

Civil Action No. 4-75-671

APPENDIX B

OPINION OF THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES DATED APRIL 7, 1980

Temporary Emergency Court of Appeals of the United States

No. 8-8
HAROLD N. EVANSON, *et al.*, and
UNITED STATES OF AMERICA, *et al.*,
PLAINTIFFS-APPELLEES,

v.

UNION OIL COMPANY OF CALIFORNIA,
DEFENDANT-APPELLANT.

No. 8-9
UNION OIL COMPANY OF CALIFORNIA,
DEFENDANT-PETITIONER,

v.

THE HONORABLE EARL R. LARSON, District Judge,
United States District Court for the
District of Minnesota,
RESPONDENT,
and
HAROLD N. EVANSON, *et al.*, and
UNITED STATES OF AMERICA, *et al.*,
PLAINTIFFS-RESPONDENTS.

Appeal from and Petition for Writs of Mandamus and Prohibition to the United States District Court for the District of Minnesota
(No. 4-75-Civ. 671)

(No. 8-8 submitted Jan. 24, 1980
(No. 8-9 submitted Jan. 11, 1980 Decided: April 7, 1980)

JOE A. WALTERS, WILLIAM E. FLYNN, DAVID W. KELLEY, O'Connor & Hannan, Minneapolis, Minnesota, and RICHARD G. MORGAN, DONALD S. ARBOUR, O'Connor & Hannan, Washington, D.C., for Appellant in No. 8-8 and for Petitioner in No. 8-9.

ROBERT J. HENNESSEY and JON S. SWIERZEWSKI, Larkin, Hoffman, Daly & Lindgren, Ltd., Minneapolis, Minnesota, for Appellees in No. 8-8 and for Respondents in No. 8-9. ALICE DANIEL, Acting Assistant Attorney General, ANDREW W. DANIELSON, United States Attorney, DONALD F. PARR, Assistant United States Attorney, C. MAX VASSANELLI, WILLIAM COLE, Attorneys, Department of Justice, Washington, D.C.; NANCY C. CRISMAN, THOMAS H. KEMP, KATHERINE L. HENRY, MARGARET A. WEEKES, Attorneys, Department of Energy, Washington, D.C.; CHARLES D. SCHOOR, STEPHEN P. DIETSCH, Attorneys, Office of Special Counsel, Department of Energy, Los Angeles, California; for Appellees in No. 8-8 and for Respondents in No. 8-9.

Before BECKER, BONSAL and LACEY, Judges.

BONSAL, Judge.

Defendant Union Oil Company of California ("Union") appeals from an order of the United States District Court for Minnesota that imposed sanctions on Union pursuant to Fed. R. Civ. P. 37(b)(2) on the ground that Union gave false answers to interrogatories served by plaintiffs. Plaintiffs have filed motions to dismiss Union's appeal for lack of jurisdiction. Alternatively, Union has petitioned for writs of mandamus and prohibition directing that the district court vacate its order and enjoining its enforcement. We grant plaintiffs' motions to dismiss the appeal for lack of jurisdiction and dismiss Union's petition for a writ.

I

The order that is the subject of this appeal was issued by the district court during pretrial discovery proceedings. This action was brought under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751, *et seq.*, claiming pricing violations by Union. Plaintiffs questioned the truth of Union's answers to certain interrogatories and were accorded a hearing. Following the hearing, the district judge found that one of the interrogatories "was answered falsely and that the earlier answers were undoubtedly evasive." *Evanson v. Union Oil Co. of California*, No. 4-75-Civ. 671 (D. Minn. December 14, 1979), memorandum order, at 3. He found that the following facts would "be deemed to be established":

> "1. The defendant Union Oil Company of California knew how it was required to calculate selling prices on its gasoline products under the applicable pricing regulations.
>
> "2. That for all classes of customers defendant Union Oil Company of California did not use as the actual selling prices of its gasoline products the prices required under the applicable regulations.
>
> "3. That the responsible executives of Union Oil Company of California and therefore Union Oil Company of California itself, knew that the actual selling prices of its gasoline products were not the prices required under the applicable regulations." *Id.* at 4.

The district court directed Union to pay the costs of the non-government plaintiffs incurred by them by reason of the false responses, in the amount of $60,961.09.

II

Union asserts that this court has jurisdiction over its appeal under 28 U.S.C. § 1291 and 12 U.S.C. § 1904 note. These sections provide that appeals may be taken only from "final" decisions. According to Professor

Moore, "[m]ost orders requiring or denying discovery do not finally dispose of the proceeding or of any independent offshoot of it, and are, therefore, not appealable." 4 Moore's Federal Practice ¶ 26.83[3], at 26-585. Such non-appealable decisions would include "an order that a particular matter be taken as established." *Id.* ¶ 26.83[7], at 26-601. To allow interlocutory appeals of this nature would lead to piecemeal review and burdensome litigation. *See Cobbledick v. United States*, 309 U.S. 323, 324-26 (1940); *Dibella v. United States*, 369 U.S. 121, 124 (1962).

However, Union attempts to fit the order of the court below into the exception to non-appealability created by *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949). *Cohen* allowed an interlocutory appeal of a pretrial order denying a motion to require that security be posted to cover costs, but only because the decision fell "in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole cause is adjudicated." *Id.* at 546. The limited exception envisioned by *Cohen* does not apply to the mass of cases involving interlocutory discovery orders. *David v. Hooker, Ltd.*, 560 F.2d 412, 416 n.6 (9th Cir. 1977); *Shattuck v. Hoegl*, 523 F.2d 509, 516 (2d Cir. 1975); *Cromaglass Corp. v. Ferm*, 500 F.2d 601, 605 (3d Cir. 1974); *American Express Warehousing, Ltd. v. Transamerica Insurance Co.*, 380 F.2d 277, 280 (2d Cir. 1967). *See* 4 Moore's Federal Practice ¶ 26.83(6), at 26-599 (*Cohen* should only be applied to discovery orders in extraordinary situations). *But see State of Ohio v. Arthur Anderson & Co.*, 570 F.2d 1370 (10th Cir. 1978).

The sanctions ordered by the district judge under Rule 37 are not separable and collateral to the review of the case, as required by *Cohen*. The facts taken as proven

go to the merits of the case, and thus involve matters that are "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Mercantile National Bank at Dallas v. Langdeau*, 371 U.S. 555, 558 (1963). Moreover, the district court noted that it was not imposing sanctions relative to the intentional or willful nature of Union's conduct, although it might have done so under Rule 37. Memorandum order, at 4. The court left the door open for Union to assert affirmative defenses to the main action based upon bona fide error in calculating its selling prices. Thus, the order is not dispositive of all of Union's defenses that can be made in the district court.

Union finally contends that it would be more efficient to permit its appeal now. However, an immediate appeal here would not materially advance the ultimate termination of this litigation. The validity of the discovery sanctions can be questioned, along with any other issues in this proceeding, following a final decision. "Ordinarily it is difficult to believe that a discovery order will present a controlling question of law or that an immediate appeal will materially advance the termination of the litigation." C. Wright & A. Miller, 8 Federal Practice and Procedure § 2006. Permitting an appeal here would "authorize *indiscriminate* interlocutory appeal of decisions made by the trial judge." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474 (1978) (emphasis by the Court).

III

Granting the motion to dismiss the appeal requires us to consider Union's alternative petition for writs of mandamus and prohibition pursuant to 28 U.S.C. § 1651(a).*

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* Otherwise known as the All Writs Act, 28 U.S.C. § 1651 (a) provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

These extraordinary writs are used sparingly and only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so," *Roche v. Evaporated Milk Association*, 319 U.S. 21, 26 (1943), or to correct a "clear abuse of discretion," *Bankers Life and Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953). "It is, of course, well settled, that the writ is not to be used as a substitute for appeal, *Ex Parte Fahey*, 332 U.S. 258, 259-60 [(1947)], even though hardship may result from delay and perhaps unnecessary trial . . . ." *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). It is therefore not surprising that courts have shown an extreme reluctance to issue these extraordinary writs. *See, e.g., Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1344 (2d Cir. 1972); *United States v. Hankish*, 462 F.2d 316, 318 (4th Cir. 1972); *Fisons Ltd. v. United States*, 458 F.2d 1241, 1244 n.2 (7th Cir.), *cert. denied*, 405 U.S. 1041 (1972). *See also Ex Parte Republic of Peru*, 318 U.S. 578, 584-85 (1943). *See generally* Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 Harv. L. Rev. 595 (1973).

In the case before us we have carefully reviewed the actions taken by the district judge. None of the actions appear to us to constitute either a usurpation of power or a clear abuse of discretion. "The writ . . . is not to be used when 'the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction.' *Parr v. United States*, 351 U.S. 513, 520 [(1956)]; see *Bankers Life & Casualty Co. v. Holland, supra*, at 382." *Schlagenhauf v. Holder*, 379 U.S. at 112.

Plaintiffs' motions to dismiss the appeal are granted.

Union's petition for writs of mandamus and prohibition is denied.

IT IS SO ORDERED.

APPENDIX C

ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA,
DATED AUGUST 14, 1979

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Harold N. Evanson, et al.
and United States of America,
et al.,

Plaintiffs,

v.

MEMORANDUM ORDER
No. 4-75 Civ. 671

Union Oil Company
of California,

Defendant.

The private Plaintiffs have moved the Court for an Order setting an evidentiary hearing to determine whether Defendant Union Oil Company of California (Union) has falsified answers to certain interrogatories. Based upon the Motion, Memorandum and attached exhibits and all of the files and records herein, the Court finds that there is probable cause to believe that portions of the answers given to certain of the private Plaintiffs' interrogatories (Nos. 35, 41, 42, 43, 44 and 58) are false.

In view of the foregoing, it is Ordered that:

1. An evidentiary hearing shall be held on October 1, 1979, at 9:00 a.m. at Courtroom 2, Sixth Floor, Federal Court Building, 110 South Fourth Street, Minneapolis, Minnesota.

2. At such time Defendant Union is directed to present in Court the following documents:

a. Union's base price file.
b. Union's posted price sheets for the period from May 15, 1973, through January 1, 1976.
c. All base price sheets identified in the December 17, 1973, transmittal letter from R.R. Cowan to Division Sales Managers and/or District Sales Managers, identified as Exhibit 13 attached to the Memorandum in Support of private Plaintiffs' Motion.
d. The original of said Exhibit 13.
e. All other transmittal letters and attached price sheets directing the use by Division Sales Managers and/or District Sales Managers of alleged base prices.
f. Computer reports identified as WW56059E, dated October 29, 1973, and DD56059E dated November 16, 1973, which reports were identified in the May 21, 1979, letter from Union's counsel, O'Connor and Hannan, as the computer reports setting forth Union's claimed May 15, 1973, weighted average prices.
g. Computer reports WW56059E, dated June 28, 1974 and WW56059E, dated August 17, 1974, as identified in said May 21, 1979 letter.

h. Computer report DD56059J, dated January 30, 1974, described as "Phase IV Eastern May 15 Base Price Listing-Divisional/Commercial Light Oils."

i. A list of all cost pass-throughs from August 17, 1973, through January 1, 1976, broken down by the date of the cost pass-through and the amount.

3. Defendant Union is directed to present such witness or witnesses to the Court for sworn testimony identifying the documents listed in paragraph 2 above and explaining their use by the Defendant Union. Defendant Union shall, fifteen (15) days before the time set for the hearing of this matter, serve upon counsel for private Plaintiffs and for the United States of America a list of the witnesses who will be called pursuant to this portion of the Order and shall provide those counsel access to those documents at the offices of O'Connor and Hannan, 38th Floor, IDS Tower, Minneapolis, Minnesota, at least ten (10) days prior to the hearing date set by this Order.

4. If it is admitted or established that the answers to the interrogatories enumerated above are false, Union may present such witnesses whose testimony it considers relevant to the Court's determination of proper sanctions under Rule 37(b)(2) of the Federal Rules of Civil Procedure. If such witnesses are to be called, a list of the names and positions with Union of each witness and a list of all documents which Union intends to introduce shall be served upon counsel for the private Plaintiffs and for the United States of America fifteen (15) days prior to the hearing date set by this Order. Furthermore, Defendant Union shall provide counsel for the private Plaintiffs and for the United States of America a summary of the testimony

that Defendant Union intends to introduce through each of the witnesses and shall provide those counsel access to those documents at the offices of O'Connor and Hannan, 38th Floor, IDS Tower, Minneapolis, Minnesota, at least ten (10) days prior to the hearing date set by this Order.

S/ Earl R. Larson
United States Senior District Judge

Dated: August 14, 1979.

APPENDIX D

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, DATED DECEMBER 14, 1979

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Harold N. Evanson, et al., and United States of America, et al.,	)	
Plaintiffs	)	**MEMORANDUM ORDER**
v.	)	No. 4-75-Civ. 671
Union Oil Company of California,	)	
Defendant	)	

****

A.

This action was initially filed by a group of car wash owners to recover alleged overcharges on gasoline products sold to them by the defendant Union Oil Company. The United States was later added as a plaintiff. For the last two and one-half years the parties have been conducting extensive discovery. The instant Order is prompted by one of a series of problems which have arisen in the course of discovery.

The current motion was brought by private plaintiffs for sanctions against Union Oil because it allegedly falsified answers to plaintiffs' interrogatories. The interrogatories at issue are Nos. 35, 41, 42, 43, 44, and 58 in plaintiffs' second set of interrogatories, with particular emphasis on No. 35. The history of defendant's responses to plaintiffs' attempts to obtain a straight answer to this question provides an excellent education in how to unduly prolong litigation. Plaintiffs' second set of interrogatories was initially sent to defendant on November 3, 1977. Initial answers to these questions were supplied to plaintiffs on February 27, 1978. Union answered interrogatory No. 35 as follows:

> "State in detail the manner in which Union determined its May 15, 1973 Weighted Average Price by terminal for each class of purchaser."
>
> "*ANSWER*: Union objects to this Interrogatory on the grounds of irrelevance, vagueness, overbreadth, and going beyond the scope of the class, except insofar as it is limited to the calculation of the May 15, 1973 Weighted Average Price in regard to the class of customers involved in this lawsuit.
>
> "At the present time, Union is unable to answer this Interrogatory. It is continuing efforts to obtain the information concerning the subject matter of this Interrogatory."

Within a week plaintiffs notified defendant that the answers were insufficient. Defendant agreed to

supplement the answers. These supplemental answers were given to plaintffs on March 31, 1978. The supplemental response to No. 35 was:

> "SUPPLEMENTAL ANSWER: Union objects to this Interrogatory on the ground of irrelevance, vagueness, overbreadth, and going beyond the scope of the class, except insofar as it is limited to the calculation of the May 15, 1973 Weight Average Price in regard to Union's retail class of customers.
>
> "Union's May 15, 1973 Weighted Average Prices for its retail class of purchasers for each pricing point were based upon the posted dealer tank wagon prices in effect at the respective locations on May 15, 1973. Union believed that the posted prices accurately reflected actual transactions on May 15, 1973 and that any deviations from posted prices would be *de minimus.*"

These answers were still not satisfactory to plaintiffs and the court ordered Union, on January 19, 1979, to answer a number of interrogatories, including the ones now claimed to have been falsely answered. On March 1, 1979, Union supplied plaintiffs with the new answers. The completed answer to No. 35 now read:

> "*ANSWER*:
>
> Union has previously answered that it used the posted dealer tank wagon prices for each pricing point which was in effect on May 15,

1973, as its Weighted Average Prices for its retail cla of purchaser. It further explained that it believed that the posted prices accurately reflected actual transactions on May 15, 1973 and that any deviations from posted prices would be *de minimus*. Union determined its Weighted Average Prices for its jobber class of purchaser in the same manner using jobber posted prices. It further states, with respect to both its retail and jobber classes of purchasers in its Western Region, Union did prepare a computer run in October of 1973 which set forth actual transactions as reflected on delivery tickets for the various pricing points on May 15, 1973 or the first day prior thereto, if none occurred on May 15, 1973. Union's review of that computer run confirmed its belief that nearly all sales were at posted price.

In the Eastern Region, Union determined its May 15, 1973 Weighted Average Prices for the commercial class of purchaser at each pricing point by using a weighted average of actual sales as reflected by delivery tickets for May 15, 1973 or the first day prior to May 15, 1973, if no sales occurred on that date. In computing their Weighted Average Prices, the sales at the pricing points were also broken down by quantity. In the Western Region, Union determined its May 15, 1973 Weighted Average Prices for the commercial class of purchaser at each pricing point by using a weighted

average of all actual sales as reflected by delivery tickets for the 45 day period from April 1 through and including May 15, 1973. In computing these Weighted Average Prices, the sales at the pricing points were also broken down by quanitity as determined by mode of delivery. These May 15, 1973 Weighted Average Prices for commercial customers in the Western Region were again recalculated at the request of the FEA in the summer of 1974 using only the sales on May 15, 1973 or the first day prior to May 15, 1973, if none occurred at the pricing point on that date. Those recomputed May 15, 1973 Weighted Average Prices also took into account quantity distinctions and were used effective October 1, 1974 through December 31, 1974.

Union is endeavoring to ascertain precisely how the May 15, 1973 Weighted Average Prices were ascertained for Wholesale Class of Purchaser and will provide the same when it becomes available.

Copies of computer reports and other relevant documents will be produced for Plaintiff's inspection concerning the foregoing."

Plaintiffs undertook an extensive investigation into the accuracy of these answers. Claiming that they had found the answers to be false, plaintiffs requested an evidentiary hearing on the possibility of sanctions. This

request was granted and the hearing was held on October 3, 4 and 5, 1979. Plaintiffs then recommended certain sanctions against the defendant.

Union, of course, contends that the answers were not false. This rests largely on the hypertechnical argument that the interrogatory merely asked if Union calculated May 1973 Weighted Average Prices, not whether it used them. The final answer to the interrogatory in one place clearly states that the prices calculated were used. Common sense would inform anyone that the question was directed toward prices used. Furthermore, the definitions in the introduction to the interrogatories define "May 15, 1973 Weighted Average Price" as:

> "The May 15 *selling* price of gasoline to be calculated pursuant to the price rules. . . ." (Emphasis added).

The information developed at the evidentiary hearing overwhelmingly revealed that the interrogatory was answered falsely and that the earlier answers were undoubtedly evasive. The answer was false because Union did not use the calculated prices for its commercial class of customers. It is clear that Union made no effort to put into effect any prices it had calculated under the regulations. Union did not attempt to determine if selling prices were related to the prices calculated under the regulations. And Union could easily have answered this interrogatory when it was first asked. The documents necessary for the answer were all available at that time. And although the Court does not believe it is necessary to show bad faith on the part of Union before applying some sanctions under Rule 37 of the Federal Rules of Civil Procedure, see the

Advisory Committee Note to the rule, the courtroom demeanor of several of defendant's employees, as well as its course of conduct in this litigation, amply demonstrates, the recalcitrant attitude Union took toward the regulations and this lawsuit. Giving a false answer is itself sufficient evidence of bad faith.

Union also contends that no sanctions under Rule 37(b) can be levied against it because it has never been ordered to answer the interrogatories. This is plainly not true. The Court has carefully reviewed the memorandum submitted in regard to the hearing preceding the January 19, 1979, Order, as well as the hearing transcript. That review and the Court's recollection (obviously the Court is in the best position to know the intent of its Orders) show that the January 19, 1979, Order directly commanded defendant to answer these interrogatoires because prior answers were incomplete. Evasive or incomplete answers justify an order under Rule 37(a). Further incomplete or false answers do not require a second order before 37(b) sanctions may be imposed. 4A Moore's Federal Practice § 37.02[5] (2d ed. 1978). An implicit condition in any order to answer an interrogatory is that the answer be true, responsive and complete. A false answer is in some ways worse than no answer; it misleads and confuses the other party.

Private plaintiffs have suggested that the proper sanction would be to find that Union's activities were "intentionally" and "willfully" in disregard of the applicable pricing regulations. In actions under the Economic Stabilization Act, 12 U.S.C. § 1904, note, when the plaintiff establishes that he has been overcharged,

the Court may in its discretion award treble damages. Economic Stabilization Act, §210(b)(1). The defendant is provided an affirmative defense to the treble damages if it can prove that the overcharge was not intentional and was the result of a bona fide error. *Id.* at § 210(b). A proviso to § 210 also requires that unless the overcharge is "willful," the plaintiff must have given the defendant a chance to refund the overcharge. The legislative history indicates that different standards were embraced by the use of "willful" in one section and "intentional" in the order. [1971] U.S. Code Cong. & Ad. News 2283, 2310. The sanction plaintiffs request would essentially determine the lawsuit against Union.

B.

The Court believes that it could in its discretion sanction Union by establishing that its pricing behavior was "intentional" and "willful" within the meaning of the statute. It also might be proper under Rule 37(b)(2)(B) to preclude Union from asserting the statutory affirmative defense against treble damages that the overcharge was not intentional and resulted from a bona fide error. The Court is reluctant to go this far.

Instead Union will be sanctioned under Rule 37(b)(2)(A) by having certain facts relating to the falsified interrogatories deemed to be true, and by being required to pay plaintiffs' attorneys' fees and expenses in connection with the investigation of the interrogatory answers and evidentiary hearing, as allowed under Rule 37(b)(2).

The following facts will be deemed to be established for all purposes:

1. The defendant Union Oil Company of California knew how it was required to calculate selling prices on

its gasoline products under the applicable pricing regulations.

2. That for all classes of customers defendant Union Oil Company of California did not use as the actual selling prices of its gasoline products the prices required under the applicable regulations.

3. That the responsible executives of Union Oil Company of California and therefore Union Oil Company of California itself, knew that the actual selling prices of its gasoline products were not the prices required under the applicable regulations.

These facts are connected to the purpose of the interrogatories which were falsified. That purpose was to discover information about how Union Oil determined its May 1973 prices and to unearth facts which might show that Union Oil intentionally or willfully ignored the applicable regulations in setting its prices. The Court feels confident that it is correct in imposing these sanctions under Rule 37(b)(2) not only because of defendant's irresponsible conduct, but also because the documents and testimony produced at the evidentiary hearing so clearly support the existence of the facts which are deemed to have been established.

Plaintiffs' attorneys' fees and expenses in investigating the answers and in connection with the evidentiary hearing were directly caused by defendant's false replies. Plaintiffs' attorney submitted an affidavit detailing these services and expenses. Costs related to items which may be used in other phases of the lawsuit seem to have been reasonably apportioned. Defendant Union Oil will pay plaintiffs' attorneys' fees and expenses in the sum of $60,961.09.

In conclusion, the Court would like to express its desire and expectation that all parties to this action conduct the litigation so as to procure a just and speedy result. The Court has been extremely accomodating in the past. The events leading up to this Order now require a firmer approach.

Therefore, IT IS ORDERED:

1. That the facts listed in Part B of this memorandum will be deemed to be established for all purposes.

2. That defendant Union Oil Company of California pay the private plaintiffs' attorneys' fees and expenses in the sum of $60,961.09, to be paid to plaintiffs' attorneys within thirty days.

s/s Earl R. Larson
United States Senior District Judge

December 14, 1979.

APPENDIX E

STATUTORY PROVISIONS INVOLVED

STATUTES OF THE UNITED STATES

Economic Stabilization Act of 1970 12 U.S.C. § 1904, note

"§ 208. Sanctions; criminal fine and civil penalty

"(a) Whoever willfully violates any order or regulation under this title shall be fined not more than $5,000 for each violation.

"(b) Whoever violates any order or regulation under this title shall be subject to a civil penalty of not more than $2,500 for each violation.

"§ 210. Suits for damages or other relief

"(a) Any person suffering legal wrong because of any act or practice arising out of this title or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

"(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

"(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

"(2) not less than $100 or more than $1,000;

except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: *Provided,* That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

"(c) For the purposes of this section, the term 'overcharge' means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title.

EMERGENCY PETROLUEM ALLOCATION ACT OF 1973

15 U.S.C. § 754. Administration and enforcement; delegation of authority; civil and criminal penalties

(a)(1) Except as provided in paragraph (2), (A) sections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on November 27, 1973) shall apply to the regulation promulgated under section 753(a) of this title, to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the

Economic Stabilization Act of 1970; and (B) section 212 (other than 212(b)) and 213 of such Act shall apply to functions under this chapter to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

MANDATORY PETROLEUM PRICE REGULATIONS

10 C.F.R. §§ 212.1 *et seq.*
39 F.R. 1949 (January 15, 1974)

§ 212.31 Definitions.
For purposes of this part—

* * *

"Class of purchaser" means purchasers to whom a person has charged a comparable price for comparable property or service pursuant to customary price differentials between those purchasers and other purchasers.

* * *

§ 212.82 Price rule.

(a) *Rule.* A refiner may not charge to any class of purchaser a price in excess of the base price of that covered product except to the extent permitted pursuant to the provisions of paragraphs (c) through (k) of this section.

* * *

(f) *Base price*—(1) *General rule. (i)* The base price for sales of an item by a refiner is the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973 plus *(a)* increased product costs incurred between the month of measurement and the month of May 1973 and measured pursuant to the provisions of § 212.83 and *(b)* the refiner incentive factor calculated and permitted pursuant to the provisions of § 212.84. In computing the base price, a firm may not exclude any temporary special sale, deal or allowance in effect on May 15, 1973.

* * *

(3) *Imputed prices.* If no transaction occurred with respect to a particular product on May 15, 1973, the most recent day preceding May 15, 1973 when a transaction occurred shall be used for purposes of computing the base price. If a refiner first offered an item for sale after May 15, 1973 and prior to the effective date of this paragraph, the first day when the item was offered for sale shall be used for purposes of computing the base price.

§ 212.83 Allocation of refiner's increased product costs.

* * *

(d) *Carryover of costs.* (1) If in any month beginning with October 1973, a firm charges prices for a special product which result in the recoupment of less total revenues than the entire amount of increased product costs calculated for that product pursuant to the general formula and allowable under paragraph (c)(1)(i) of this section and that unused amount of increased costs is not used to increase May 15, 1973 selling prices pursuant to paragraph (c)(1)(ii) of this section, the amount of increased product cost not recouped may be added to the May 15, 1973 selling prices to compute the base prices for that special product for a subsequent month...

* * *

FEDERAL RULES OF CIVIL PROCEDURE

Rule 37

FAILURE TO MAKE DISCOVERY: SANCTIONS

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to repond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply with Order.

(1) *Sanctions by Court in District Where Deposition is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be

taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order:

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence:

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E)) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party

requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a) or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivison may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) Subpoena of Person in Foreign Country. A subpoena may be issued as provided in Title 28 U.S.C. § 1783, under the circumstances and conditions therein stated.

(f) Expenses Against United States. Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule.

As amended Dec. 29, 1948, eff. Oct. 20, 1949; March 30, 1970, eff. July 1, 1970.

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No. 79-1877

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

UNION OIL COMPANY OF CALIFORNIA,

Petitioner,

v.

HAROLD N. EVANSON, ET AL., UNITED STATES OF AMERICA, ET AL., AND THE HONORABLE EARL R. LARSON, UNITED STATES DISTRICT JUDGE,

Respondents.

On Petition For a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

---

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether an order granting sanctions under Rule 37(b)(2), Federal Rules of Civil Procedure, for failure to provide discovery is appealable when the order is neither a final decision under 28 U.S.C. §1291 nor within any exception to the requirement of finality.

TABLE OF CONTENTS

Page

OPINIONS BELOW.....1

STATUTORY PROVISIONS INVOLVED.....2

STATEMENT OF THE CASE.....2

SUMMARY OF ARGUMENT.....10

ARGUMENT.....12

TECA PROPERLY APPLIED THE STANDARDS OF COHEN AND ITS PROGENY IN DECIDING THE DISCOVERY ORDER WAS NOT COLLATERAL AND THUS NOT APPEALABLE

THE DECISION BY TECA IS CONSISTENT WITH THE PRINCIPLES ESPOUSED BY THE UNITED STATES SUPREME COURT AND THE DECISIONS OF THE COURTS OF APPEALS FOR THE OTHER CIRCUITS

CONCLUSION.....27

TABLE OF AUTHORITIES

Cases:

Arthur Andersen & Co. v. Finesilver, 546 F.2d 338 (10th Cir. 1976), cert. denied, 429 U.S. 1096 (1977).....25

Cobbledick v. United States, 309 U.S. 323 (1940).....13

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).....passim

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).....15,17,18

Cromaglass Corp. v. Ferm, 500 F.2d 601 (3d Cir. 1974).....23

David v. Hooker, Ltd., 560 F.2d 412 (9th Cir. 1977).....24

Diaz v. Southern Drilling Corp. 427 F.2d 1118 (5th Cir.), cert. denied, 400 U.S. 878 (1970).....24

Dow Chemical Co. v. Taylor, 519 F.2d 352 (6th Cir.), cert. denied, 423 U.S. 1033 (1975).....23

In re the Attorney General of the United States, 596 F.2d 58 (2d Cir. 1979).....24

Independent Investor Protective League v. Touche Ross & Co., 542 F.2d 156 (2d Cir. 1976).....24

Independent Investor Protective League v. Touche Ross & Co., 607 F.2d 530 (2d Cir. 1978).....24

Marine Petroleum Co. v. Champlin Petroleum Co., ___ F.2d ___, No. 8-4 (Em.App. February 25, 1980).....15,21

Ohio v. Arthur Andersen & Co., 570 F.2d 1370 (10th Cir.), cert. denied, 439 U.S. 833(1978).....25,26

United States v. Ryan, 402 U.S. 530 (1971)....20

Statutes:

United States Code
12 U.S.C. §1904, note.....12,16
15 U.S.C. §§751 et seq. 3,12
28 U.S.C. §1291.....2,12,21
28 U.S.C. §1292.....12

Regulations:

Code of Federal Regulations (39 Fed. Reg. 1924; January 15, 1974)
10 C.F.R. §212.31.....3
10 C.F.R. §212.81-88.....3
10 C.F.R. §212.82(a).....3
10 C.F.R. §212.82(f)(1)(i).....4
10 C.F.R. §212.82(f)(3).....4
10 C.F.R. §212.83.....4

Rules:

Federal Rules of Civil Procedure
Rule 37.....8,14,22
Rule 54.....22,25

NO. 79-1377
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UNION OIL COMPANY OF CALIFORNIA,

Petitioner,

v.

HAROLD N. EVANSON, et al., UNITED STATES OF AMERICA, et al., and THE HONORABLE EARL R. LARSON, UNITED STATES DISTRICT JUDGE,

Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals dismissing the appeal and denying the requested writ of mandamus and

prohibition (Appendix B of Petition) is reported at 619 F.2d 72. The order entered by the District Court on December 14, 1979 (Appendix D of Petition) is reported at 85 F.R.D. 274.

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions set forth in the Petition (Appendix E), Respondents rely upon the following statute:

> 28 U.S.C. §1291. Final decisions of district courts.
>
> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

This lawsuit is a class action on behalf of certain retail dealers who purchased gasoline from Union. The suit alleges that Union violated the refiners' price rules,

10 C.F.R. §§212.81-.88,[1] enacted under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §751 et seq. Basically, the price rules require a refiner to make several determinations in calculating lawful selling prices for its regulated products. First, the refiner must determine its appropriate "class(es) of purchasers." 10 C.F.R. §212.82(a). A class of purchasers is defined as those customers who were paying a comparable price for a comparable product on May 15, 1973. 10 C.F.R. §212.31. Second, the refiner must determine a weighted average

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[1] All citations to 10 C.F.R. are to the regulations adopted by the Federal Energy Office on January 15, 1974 (39 Fed. Reg. 1924). The text of the cited regulations is set forth in Appendix E to the Petition, pp. A-2 to A-26.

price for each product for each class of purchaser. 10 C.F.R. §212.82(f)(1)(i). The weighted average price is determined for each class of purchaser by using actual transactions which occurred on May 15, 1973, id., or on the date imputed by the regulations. 10 C.F.R. §212.82(f)(3). The resulting weighted average price becomes the first component of the base selling price for that class of purchasers. The refiner is allowed to add increased costs incurred for crude petroleum after May 15, 1973, to the weighted average price when establishing the base selling price to each class of purchasers. 10 C.F.R. §212.82(f)(1)(i)(a); see generally 10 C.F.R. §212.83.

The suit was filed on December 31, 1975. On November 3, 1977, plaintiffs Harold

N. Evanson, et al. (the Respondents here), served their Second Set of Interrogatories to Union. Certain of those Interrogatories requested information on Union's determination of its May 15, 1973 weighted average prices as required by the refiner's price rules. Union requested and received a ninety-day extension of time within which to answer the Interrogatories. At the end of the extension, Union claimed it was unable to supply the answers to the Interrogatories regarding weighted average prices. Respondents objected to Union's insufficient answers. Union then requested an additional thirty days to supplement its answers, and the District Court so directed. In its supplemental answers, Union admitted it did not use the May 15, 1973 weighted average prices in establishing selling prices for

its retail class of purchasers. However, Union refused to answer the Interrogatories for any of its other classes of purchasers (jobber, commercial, wholesale). Respondents continued to pursue responsive answers from Union.

Following the breakdown of negotiations conducted between counsel as required by local rules for the District of Minnesota, Respondents moved the District Court to order Union to answer the Interrogatories fully. The Court so ordered. On March 1, 1979, Union filed supplementary answers to the Interrogatories which the Court had ordered Union to answer. For its commercial class of customers, Union claimed to have determined the May 15, 1973 weighted average price component of its selling prices by using two different methods of weight

averaging. In its supplementary answers, Union identified two separate computer reports which allegedly showed the prices determined by Union's two methods of weight averaging its May 15, 1973 selling prices.

After obtaining Union's supplementary answers, Respondents conducted a nation-wide investigation of Union's actual pricing activities for the relevant period. The results of that investigation led Respondents to believe Union's supplementary answers were false. Specifically, Respondents' investigation indicated Union had never used the weighted average prices shown on the identified computer reports to establish its selling prices. Respondents requested and received an order of the District Court setting an evidentiary hearing to take testimony and examine documents to determine

if the answers had indeed been falsified. The evidentiary hearing conclusively established that the Interrogatory answers were indeed false and were known to be false when given. Following the submission by all counsel of memoranda outlining their recommendations for what sanctions, if any, should be imposed, the District Court entered its order of December 14, 1979.

The order, issued under Rule 37(b)(2)(A), F.R.Civ.P., directed that for Union's failure to comply with the earlier order of the Court compelling discovery, certain facts would be taken as established. These facts, which are inextricably bound with the central issues of the lawsuit and which relate directly to the Interrogatories asked, were established to comport with the evidence presented at the evidentiary

hearing. The District Court ordered:

> The following facts will be deemed to be established for all purposes:
>
> 1. That defendant Union Oil Company of California knew how it was required to calculate selling prices on its gasoline products under the applicable pricing regulations.
>
> 2. That for all classes of customers defendant Union Oil Company of California did not use as the actual selling prices of its gasoline products the prices required under the applicable regulations.
>
> 3. That the responsible executives of Union Oil Company of California and therefore Union Oil Company of California itself, knew that the actual selling prices of its gasoline products were not the prices required under the applicable regulations.

85 F.R.D. at 278.

Union appealed the December 14, 1979 order to the Temporary Emergency Court of Appeals of the United States (TECA) on January 11, 1980. On January 21, 1980,

Respondents filed with TECA a motion to dismiss on the grounds the order was not appealable at that time. On January 30, 1980, Union filed a Memorandum in Opposition to Respondent's Motion to Dismiss. On April 7, 1980, TECA granted the Respondents' Motion to Dismiss.[2]

SUMMARY OF ARGUMENT

In its Petition, Union Oil Company of California (Union) has incorrectly set

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2 Upon dismissing the appeal, TECA considered Union's alternative petition for a writ of mandamus and prohibition. After a careful review of the actions taken by the district judge, TECA concluded there had not been a "usurpation of power or a clear abuse of discretion." 619 F.2d at 75. Union's petition was denied. Union has not clearly stated whether it seeks review of the denial. Thus, Respondents have not dealt further with this point.

forth the pertinent issues. The only issue properly before this Court is whether an interlocutory order granting sanctions for failure to comply with an order to provide discovery should be reviewed before the District Court has entered a final judgment. Union incorrectly devotes the major portion of its petition to the propriety of the sanction order. (Petition, pp. 8-14.) The propriety of the District Court's order is certainly reviewable, but only at the appropriate time.[3] As TECA correctly stated: "[t]he validity of the discovery sanctions

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[3] As Union's arguments concerning the appropriateness of the District Court's actions do not bear on the question of whether certiorari should be granted or denied, Respondents have not discussed them further.

can be questioned, along with any other issues in this proceeding, following a final decision." 619 F.2d at 74.

ARGUMENT

TECA PROPERLY APPLIED THE STANDARDS OF COHEN AND ITS PROGENY IN DECIDING THE DISCOVERY ORDER WAS NOT COLLATERAL AND THUS NOT APPEALABLE.

The Courts of Appeals[4] only have jurisdiction over an appeal from a District Court when a final decision has been made, 28 U.S.C. §1291.[5] The policy underlying

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4 TECA, with minor exceptions, has "the powers of a circuit court of appeals." Section 211(b)(1) of the Economic Stabilization Act of 1970, Pub.L. 92-210, 12 U.S.C. §1904, note as incorporated by Section 5 of the Emergency Petroleum Allocation Act of 1973, Pub.L. 93-159, 15 U.S.C. §754.

5 But see 28 U.S.C. §1292.

the requirement of finality is clear.

> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. [Footnotes omitted]

Cobbledick v. United States, 309 U.S. 323, 324-25 (1940).

There is no question here but that Union is attempting to appeal from a nonfinal order. Union seeks to escape the requirement of finality by alleging the sanction order to be within the exception created by this Court in Cohen v. Beneficial Indus. Loan

Corp., 337 U.S. 541 (1949).

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

Id. at 546.

The thirty-year history of Cohen has consistently shown the exception to be narrow. The exception has never been utilized to permit appellate intervention when, as here, the District Court has merely entered an order as permitted under Rule 37, F.R.Civ.P., which order is clearly integrated with the merits of the action and which will comprise a step "toward final disposition of the merits of the case and will . . . be merged in final judgment." Id.

The most recent United States Supreme Court case applying the Cohen doctrine was Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978):

> To come within the "small class" of decisions excepted from the final-judgment rule by Cohen, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment. (Footnotes and citations omitted.)

Id. at 468.

TECA clearly understands the principles of Cohen as enumerated in Coopers & Lybrand, and has demonstrated its ability to apply those principles to the facts of an order urged for appeal. See Marine Petroleum Co. v. Champlin Petroleum Co., ___ F.2d ___, No. 8-4 (Em.App. February 25, 1980) (analysis of the jurisdiction of TECA under

12 U.S.C. §1904 note, §211(b)). Union made the same Cohen exception argument in urging TECA to take jurisdiction of its appeal. TECA dealt squarely with the issue and decided the order was clearly not within the exception created by Cohen and its progeny:

> The sanctions ordered by the district judge under Rule 37 are not separable and collateral to the review of the case, as required by Cohen. The facts taken as proven go the merits of the case, and thus involve matters that are "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Moreover, the district court noted that it was not imposing sanctions relative to the intentional or willful nature of Union's conduct, although it might have done so under Rule 37, 85 F.R.D. at 278. The court left the door open for Union to assert affirmative defenses to the main action based upon bona fide error in calculating its selling prices. Thus, the order is not dispositive of all of Union's defenses that can be made in the district court.

(Citation omitted.)

619 F.2d at 74.

Union has characterized the order as conclusively determining the issue of willfulness. (Petition, pp. 17-18). While the sanction order does establish as proven certain facts regarding Union's actions, both the District Court and TECA noted that Union retained the opportunity to defend any allegations of willfulness or intent by proving their actions had been the result of a bona fide error. The order does not "conclusively determine the disputed question." Coopers, 437 U.S. at 468.

It is clear from the opinions of both the District Court and TECA that the sanction order does not "resolve an important issue completely separate from the merits of the action." Id. Indeed, the sanctioned facts

are entwined inseparably with the issues of the main action. The facts taken as proven go to the merits of the case. The facts relate directly to the interrogatories asked, and further comport with the true evidence which Union was compelled to produce at the evidentiary hearing.

Finally, it is clear the sanction order is not "effectively unreviewable on appeal from a final judgment" of the District Court, when entered. Id. The District Court has set this case for trial on September 3, 1980. Union need only wait until the resolution of that trial to obtain whatever review it feels is necessary of the sanction order. It would advance this litigation in no material fashion to conduct a piecemeal review at this time.

THE DECISION BY TECA IS CONSISTENT WITH THE PRINCIPLES ESPOUSED BY THE

UNITED STATES SUPREME COURT AND THE DECISIONS OF THE COURTS OF APPEALS FOR THE OTHER CIRCUITS.

The only theoretically acceptable argument which Union presents in support of its Petition is that TECA's decision is in disagreement with decisions of this Court and the other circuit courts of appeals. Union has inappropriately focused its attention on cases examining the appealability of many different types of interlocutory orders. Union, in presenting its argument, has offered no analysis of the cases with respect to the different types of interlocutory orders involved. It is inappropriate to compare appellate or Supreme Court decisions on different types of interlocutory orders to the TECA decision here. To do so would be to compare apples to oranges. The proper analysis

is to deal with those decisions involving the appealability of discovery sanction orders. When this is done the alleged inconsistencies vanish.

Union can cite no Supreme Court case in the thirty-one year history of Cohen which would be inconsistent with the TECA decision here.[6]

TECA itself had never before squarely faced the issue presented by this case. TECA had previously reviewed the bounds

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6 United States v. Ryan, 402 U.S. 530 (1971), cited by Union, dealt with an entirely different context. The potential sanctions (contempt) envisioned by the Ryan court would indeed be reviewable, as they would be absolutely final and immediately executionable against Ryan if he failed to comply with the subpoena duces tecum.

of its appellate powers in Marine Petroleum Co. v. Champlin Petroleum Co., ____ F.2d ____, No. 8-4 (Em.App., February 25, 1980). In Marine, TECA determined that 28 U.S.C. §1291 et seq. applied to it and limited its appellate powers. TECA also determined that the Cohen decision was an integral part of its powers under 28 U.S.C. §1291, and expounded at length upon the standards of Cohen. In the instant case, TECA fairly examined those standards, and compared them with the challenged order. TECA correctly determined that the sanction order was not appealable. Union has not cited, and cannot cite, any case from TECA which would be inconsistent with that court's decision that this order, which granted sanctions for failure to comply with an order to provide discovery, is not appealable.

Union has misinterpreted the opinions of the other circuits which have ruled on the appealability of discovery sanction orders. There are certain sanctions which may be levied against a party failing to provide discovery which are indeed immediately reviewable. Rule 37, F.R.Civ.P., itself provides that a default judgment may be entered or certain claims of a party may be dismissed. It is clear that a default judgment would be immediately reviewable, as it would be a final determination of the case. A full dismissal of a plaintiff's claims would likewise be a final determination of the case. A dismissal of less than all claims, while normally not appealable without an order under Rule 54, F.R.Civ.P., could at least be a final determination of those claims, and might

be appealable under Cohen. Thus, those cases which in dicta have said that although a discovery order will not be reviewed, the imposition of sanctions would be reviewable, must be viewed as consistent with the limitations on the appellate court's jurisdiction. When the order for sanctions was presented to those courts, they should, and presumably would, apply the requirements of 28 U.S.C. §1291 and Cohen. See Dow Chemical Company v. Taylor, 519 F.2d 352 (6th Cir.), cert. denied, 423 U.S. 1033 (1975).

The preponderance of the cases actually dealing with discovery sanctions have been decided in total agreement with the requirements of 28 U.S.C. §1291 and Cohen. See Cromaglass Corp. v. Ferm, 500 F.2d 601 (3d Cir. 1974) (sanctions for failure to

answer Interrogatories, at least with respect to a party to litigation, represented neither collateral matter nor judgment which was final); David v. Hooker, Ltd., 560 F.2d 412 (9th Cir. 1977) (order appealable as final to a non-party); In re the Attorney General of the United States, 596 F.2d 58 (2d Cir. 1979) (contempt order nonappealable); Independent Investor Protective League v. Touche Ross & Co., 542 F.2d 156 (2d Cir. 1976) (sanction order dismissing claims against one firm not appealable in multi-party case) and 607 F.2d 530 (2d Cir. 1978) (appealable following final judgment).

Union cites Diaz v. Southern Drilling Corp., 427 F.2d 118 (5th Cir.), cert. denied, 400 U.S. 878 (1970) as an inconsistent decision. As Diaz involves a default

judgment, the order is clearly final as to the government-intervenor. While the order was issued in a multi-party lawsuit, and Rule 54(b), F.R.Civ.P. would normally make it non-final, the order was clearly collateral to the action between Diaz and Southern, and was certainly final within the meaning of Cohen.

The only case showing a conflict on its face is Ohio v. Arthur Andersen & Co., 570 F.2d 1370 (10th Cir.), cert. denied, 439 U.S. 833 (1978). In a previous hearing on the case, Arthur Anderson & Co. v. Finesilver, 546 F.2d 338 (10th Cir. 1976), cert. denied 429 U.S. 1096 (1977), the Tenth Circuit in dicta said while an order compelling production of documents was not appealable, a subsequent order imposing a harmful sanction would be reviewed. 546

F.2d at 342. In Ohio, the Tenth Circuit granted such a review.

It is noteworthy that the "harmful sanction" arose because Arthur Andersen would have been required to violate foreign law to comply with the order. Union faced no such threat. To answer truthfully, Union would only have had to reveal it had lied to the government over five years earlier during the conduct of an audit to gauge compliance with the price regulations.

The Ohio court merely made a blanket statement that the sanction order was reviewable under Cohen. There was no analysis of Cohen or its requirements as construed by the Supreme Court in later cases.

It is clear that if any conflict is presented between Ohio and the instant TECA

opinion, the conflict lies within Ohio and not within the decision of TECA. TECA has faithfully and correctly applied the standards of Cohen and its progeny. TECA's decision in this case is in accord with the decisions of the United States Supreme Court and the decisions of the circuit courts of appeals.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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No. 79-1877

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNION OIL COMPANY OF CALIFORNIA, PETITIONER

v.

HAROLD N. EVANSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1877

UNION OIL COMPANY OF CALIFORNIA, PETITIONER

v.

HAROLD N. EVANSON, ET AL.[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether the district court's order imposing sanctions under Rule 37(b)(2)(A), Fed. R. Civ. P., is a final order appealable under 28 U.S.C. 1291.

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[1]Other respondents are the United States; Honorable Earl R. Larson, United States District Judge; Gayland B. Miller d/b/a Heights Auto Wash; Stephen T. Graham; Brookdale Car Wash, Inc.; John Vitale; Keystone, Inc.; Jerome F. Hanover; Central Car Wash, Inc.; Alex M. Berco d/b/a Loring Auto Wash Company; Donald L. Elsen; Richard P. Elsen; James V. Casey; Glo-Auto Wash, Inc. of Lincoln Park; and Glo-Auto Wash, Inc., of Dearborn.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Allied Paper, Inc. v. *United Gas Pipe Line Co.*, 561 F. 2d 821 8

Attorney General of the United States, In re, 596 F. 2d 58, cert. denied, No. 78-1702 (October 9, 1979) 6

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 ..... 3, 4

Coopers & Lybrand v. *Livesay*, 437 U.S. 463 5

Cromaglass Corp. v. *Ferm*, 500 F. 2d 601 6

David v. *Hooker, Ltd.*, 560 F. 2d 412 6

Department of Banking v. *Pink*, 317 U.S. 264 4

Diaz v. *Southern Drilling Corp.*, 427 F. 2d 1118, cert. denied, 400 U.S. 878 6

Dow Chemical Co. v. *Taylor*, 519 F. 2d 352, cert. denied, 423 U.S. 1033 7-8

Independent Investor Protective League v. *Touche Ross & Co.*, 542 F. 2d 156 6

Page

Cases—Continued:

Gelbard v. *United States*, 408 U.S. 41 7

Marine Petroleum Co. v. *Champlin Petroleum Co.*, No. 8-4 (TECA Feb. 25, 1980) 8

Mercantile National Bank v. *Langdeau*, 371 U.S. 555 5

Mohasco Corp. v. *Silver*, No. 79-616 (June 23, 1980) 4

Roche v. *Evaporated Milk Ass'n*, 319 U.S. 21 6

Societe Internationale v. *Rogers*, 357 U.S. 197 7

State of Ohio v. *Arthur Andersen & Co.*, 570 F. 2d 1370, cert. denied, 439 U.S. 833 7

Sun Oil Co. of Pennsylvania v. *FEA*, 572 F. 2d 867 8

United States v. *Ryan*, 402 U.S. 530 7

Statutes, regulation and rules:

Economic Stabilization Act of 1970 (ESA), 12 U.S.C. 1904 note:

Section 208(a) 2

Section 210(b) 2

Section 211(g) 3, 4

Page

Statutes, regulation and rules—Continued:

Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 751 *et seq.* 1

28 U.S.C. 1254 4

28 U.S.C. 1291 ..... 3, 6, 7

28 U.S.C. 2101(c) 4

Fed. R. Civ. P.:

Rule 37 1

Rule 37(b) 6

Rule 37(b)(2) 3

Rule 37(b)(2)(A) 5, 6

Miscellaneous:

4 *Moore's Federal Practice* (2d ed. 1980) 6

S. Rep. No. 92-507, 92d Cong., 1st Sess. (1971) 4

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-2 to A-7) is reported at 619 F. 2d 72. The district court's memorandum order of December 14, 1979 (Pet. App. A-12 to A-21) is reported at 85 F.R.D. 274.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1980. On May 12, 1980, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including May 27, 1980. The petition was filed on May 27, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note.

STATEMENT

On December 13, 1975, the private respondents brought this class action against petitioner in the United States District Court for the District of Minnesota, alleging that petitioner willfully violated pricing regulations in its sales of motor gasoline. The complaint alleged that petitioner had violated pricing regulations promulgated pursuant to the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 751 *et seq.* On March 22, 1978, the United States, on behalf of the Department of Energy (DOE), intervened as a party plaintiff in this action.

During discovery proceedings, petitioner responded to several interrogatories concerning its determination of May 15, 1973, weighted average prices. After some investigation, respondents alleged that the answers to these interrogatories were false. In an order issued on August 14, 1979, the district court found that probable cause existed to believe the answers were false and

scheduled a hearing at which petitioner was directed to present witnesses to explain the answers and, if the answers proved to be false, to testify concerning appropriate sanctions (Pet. App. A-8 to A-11). After an evidentiary hearing on October 3-5, 1979, and the submission of post-hearing briefs, the district court found that the interrogatories had been answered falsely and that earlier answers on the same subject had been evasive (*id.* at A-17).

In considering the appropriate sanctions to be imposed against petitioner under Rule 37, Fed. R. Civ. P., the district court rejected the private respondents' suggestion that it should find that petitioner had "intentionally" and "willfully" disregarded the applicable pricing regulations (Pet. App. A-18). That finding would have effectively precluded an affirmative defense to treble damages under Section 210(b) of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. 1904 note.[2] Instead, the court ruled that, as a result of petitioner's conduct, the following facts relating to the falsified interrogatories would be "deemed to be established" (Pet. App. A-19 to A-20):

> 1. The [petitioner] knew how it was required to calculate selling prices on its gasoline products under the applicable pricing regulations.
>
> 2. That for all classes of customers [petitioner] did not use as the actual selling prices of its gasoline products the prices required under the applicable regulations.

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[2]A proviso to Section 210(b) of the ESA also requires that, unless the overcharge is "willful" within the meaning of Section 208(a) of that Act, the plaintiff must have given the defendant an opportunity to refund the overcharge.

> 3. That the responsible executives of [petitioner] and therefore [petitioner] itself, knew that the actual selling prices of its gasoline products were not the prices required under the applicable regulations.

The district court also directed petitioner, under Rule 37(b)(2), to pay the costs incurred by the non-government plaintiffs that were directly caused by petitioner's false replies.

Petitioner filed an immediate appeal of the order imposing sanctions. The court of appeals dismissed the appeal on the ground that the order was not appealable under 28 U.S.C. 1291 (Pet. App. A-4 to A-6). The court rejected petitioner's argument that appeal was permissible under the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), stating that the order imposing sanctions involved "matters that are 'enmeshed in the factual and legal issues' " of the case (Pet. App. A-6). The court also denied petitioner's alternative petitions for writs of mandamus and prohibition because none of the district court's actions constituted "either a usurpation of power or a clear abuse of discretion" (*id.* at A-7).

ARGUMENT

1. Petitioner contends (Pet. 15-19) that the court of appeals erred in holding that the district court's order was not appealable under 28 U.S.C. 1291 as a "collateral order."[3] This contention is without merit.

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[3]At the outset, we note that the petition for a writ of certiorari appears to be jurisdictionally out of time. Section 211(g) of ESA, 12 U.S.C. 1904 note, provides in pertinent part:

> Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to

a. In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), this Court held appealable an order denying the defendant's motion to require the plaintiff to post security for reasonable expenses pursuant to a state statute. The Court found that the order fell within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole cause is adjudicated." 337 U.S. at 546. A critical factor in this determination was that the district court's order "did not make any step toward final disposition of the merits of the case and [would] not be merged in final judgment." *Ibid.* The "collateral order" doctrine of *Cohen* applies only in those few cases where the order "resolve[s] an important issue completely separate from the merits of the

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review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code. * * *

The judgment of the court of appeals was entered on April 7, 1980, and the petition was not filed until May 27, 1980. The time limits established by Congress for petitioning for certiorari are jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

Petitioner did obtain an extension of the time for filing a petition in this case. However, neither Section 211(g) nor 28 U.S.C. 1254 explicitly authorizes such an extension of time. The general time provision for filing a certiorari petition in a civil case, 28 U.S.C. 2101(c), does permit extensions of up to 60 days, but that subsection also grants a litigant an initial 90-day period in which to file a petition. There is no evidence that Congress intended the 90-day initial period of Section 2101(c) to be inapplicable to TECA cases, as it surely is in light of Section 211(g), yet to allow the 60-day extended period to be applied in such cases. Indeed, if the availability of a 60-day extension is implied, the purpose of substituting a 30-day time limit for the 90-day time limit of 28 U.S.C. 2101(c)—*i.e.*, to expedite review of TECA cases (see S. Rep. No. 92-507, 92d Cong., 1st Sess. 10 (1971))—would be substantially defeated. See *Mohasco Corp.* v. *Silver*, No. 79-616 (June 23, 1980), slip op. 17-18.

action, and [is] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978).

The pretrial order involved here clearly does not fit within the narrow *Cohen* exception. The sanctions imposed under Rule 37(b)(2)(A) are not collateral to the underlying issues of the case. Rather, the facts that are deemed to be established are ones that go to the heart of the plaintiffs' substantive claims. Thus, as the court of appeals stated, the sanction order involves "matters that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action' " (Pet. App. A-6, quoting *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963)). However, the facts deemed to be established under the sanction order do not completely resolve the merits of the pending litigation. The district court specifically rejected the private respondents' suggestion that the sanctions include a finding of "willful" violations by petitioner (Pet. App. A-18 to A-19). Thus, as the court of appeals pointed out (Pet. App. A-6), all of petitioner's defenses on the merits have not been foreclosed. In addition, the amount of damages to the private respondents and the amount of overcharges to other purchasers, which is the focus of the government's action, remain to be determined.

Moreover, petitioner suggests no reason why the district court's sanction order cannot be fully reviewed, together with other issues that may arise, after the case is tried and final judgment entered. Permitting the appeal to be heard now would seriously delay the resolution of this litigation.[4] In sum, the order sought to be reviewed here is

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[4]The trial of this case is now scheduled to begin in September 1980, although it may have to be delayed for a short time pending a decision on this petition. Petitioner suggests (Pet. 18) that an

not collateral, but closely tied to the merits of the case, and it is equally subject to review when a final decision is reached on the merits. Accordingly, *Cohen* does not authorize review under 28 U.S.C. 1291 at this time.

b. Petitioner contends (Pet. 15-17), however, that the decision of the court of appeals creates a conflict in the circuits that requires resolution by this Court. This contention is also without merit.

Although there have not been many instances of attempted appeals from sanctions imposed under Rule 37(b)(2)(A), the prevailing view is that such orders are "clearly interlocutory." 4 *Moore's Federal Practice* para. 26.83[7] at 26-101 (2d ed. 1980). The Third Circuit has held that an order imposing such sanctions is not immediately appealable. *Cromaglass Corp.* v. *Ferm*, 500 F. 2d 601, 604-605 (1974). And courts have generally taken the same view concerning other types of sanctions imposed under Rule 37(b). See *In re Attorney General of the United States*, 596 F. 2d 58, 61 (2d Cir. 1979), cert. denied, No. 78-1702 (Oct. 9, 1979) (civil contempt); *David* v. *Hooker, Ltd.*, 560 F. 2d 412, 416 n.6 (9th Cir. 1977) (attorney's fees and expenses); *Independent Investor Protective League* v. *Touche Ross & Co.*, 542 F. 2d 156, 157-158 (2d Cir. 1976) (expenses).[5]

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immediate appeal would eliminate the inconvenience of requiring it to undergo an unfair trial. As the Court remarked in *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943), however, "that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable."

[5]Of course, an order under Rule 37(b) may be appealable if it represents a final disposition of the case, such as an order entering a default judgment. See *Diaz* v. *Southern Drilling Corp.*, 427 F. 2d 1118 (5th Cir.), cert. denied, 400 U.S. 878 (1970).

The one case that appears on its face to depart from this rule is *State of Ohio* v. *Arthur Andersen & Co.*, 570 F. 2d 1370 (10th Cir.), cert. denied, 439 U.S. 833 (1978). The court there affirmed an order imposing certain preclusionary and monetary sanctions for non-compliance with discovery orders, stating without any analysis that the sanctions were a final disposition of a claimed right collateral to the cause of action. 570 F. 2d at 1372. The court's decision, however, was motivated in large part by the allegation that compliance with the discovery orders would have required the defendant to violate Swiss law—a burden that obviously could not have been removed by appeal of the final judgment. Cf. *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958). No consideration of this sort is present in the case at bar. In light of the well-settled law in this area, the Tenth Circuit's decision in this special fact situation does not present a conflict that warrants this Court's review.

The other cases relied upon by petitioner are simply inapposite. Contrary to petitioner's suggestion (Pet. 17), *United States* v. *Ryan*, 402 U.S. 530 (1971), does not address the appealability of a discovery sanction order. In *Ryan*, the Court held that denial of a motion to quash a grand jury subpoena could not be appealed. In that context, the Court noted that the lawfulness of the subpoena could be challenged later if the petitioner refused to comply and contempt proceedings were brought against him. 402 U.S. at 532. A contempt proceeding, of course, is an action separate from a grand jury proceeding, and an order holding a defendant in contempt would be a final order in the contempt proceeding, appealable under 28 U.S.C. 1291 See, *e.g.*, *Gelbard* v. *United States*, 408 U.S. 41 (1972). [illegible] 1 in *Dow Chemical Co.* v. *Taylor*, 519 F. 2d 352, 355 (6th Cir.), cert. denied, 423 U.S. 1033 (1975), the court dismissed

an appeal of an order requiring production of documents. The court noted that if "sanctions are applied, review of the order may be obtained." 519 F. 2d at 355. This dictum is not inconsistent with the decision of the court of appeals here; as noted above (see note 3, *supra*), the imposition of certain sanctions, such as a default judgment or dismissal of an action, is immediately appealable. The *Dow* court had no occasion to consider whether sanctions of the type imposed in this case would be immediately appealable.

Petitioner also alleges (Pet. 17) that there is an "evident conflict" in TECA itself in applying the *Cohen* collateral order doctrine. There is no basis for this assertion. The cases cited by petitioner involve completely different orders that cannot easily be compared to the order in this case. *Allied Paper, Inc.* v. *United Gas Pipe Line Co.*, 561 F. 2d 821 (TECA 1977), and *Sun Oil Co. of Pennsylvania* v. *FEA*, 572 F. 2d 867 (TECA 1978), involved orders staying the proceedings pending resolution of litigation in other courts. These orders effectively terminated the particular action in which they were issued. See 572 F. 2d at 870. *Marine Petroleum Co.* v. *Champlin Petroleum Co.*, No. 8-4 (TECA Feb. 25, 1980), involved the denial of a government motion for dismissal as a party. This order, completely collateral to the merits of the case, imposed the burden on the government of continuing in the litigation and being subjected to extensive discovery. Unlike the instant case, complete relief from the order could not have been obtained on appeal after a final disposition of the litigation. See slip op. 24.

2. Petitioner also contends (Pet. 8-14) that the sanctions imposed by the district court were unlawful. Whatever the merits of this contention, it is not presented for review here, because petitioner's appeal was dismissed by the court of appeals for lack of jurisdiction. Petitioner,

of course, will be entitled to appellate review of the propriety of the sanctions when a final judgment is entered in this case. The court of appeals did consider petitioner's challenge to the sanctions in the limited context of a mandamus petition, which it denied because it found that the district court did not abuse its discretion. That determination is correct, and petitioner apparently does not challenge it here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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